

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-VS-

NICHOLAS JACKSON,

Defendant-Appellant.

Supreme Court No.
125250

Court of Appeals No.
242050

Circuit Court No.
01-177534-FC

125250
RESPONSE TO DEFENDANT'S AMENDED APPLICATION
FOR LEAVE TO APPEAL

Now Comes David Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Danielle DeJong, Assistant Prosecuting Attorney, answering defendant's application [which he has entitled "Defendant's Supplemental Brief Informing the Court of New Dispositive Authority from the United States Supreme Court"] as follows:

1. The People admit the allegations in paragraph one.
2. The People admit the allegations in paragraph two. [The People note that the defendant had originally pled guilty to all three counts but was allowed to withdraw his plea prior to trial.]
3. The People admit the allegations in paragraph three.
4. The People admit the allegations in paragraph four.

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5. The People admit the allegations in paragraph five.

6. The People admit that Tony Hines' statements were admitted at trial. The People note however, that both the trial court and Court of Appeals held that the statements of the father of the rape victim [Tony Hines] were admissible pursuant to the excited utterance hearsay exception. MRE 803(2) The declarant's statement arose out of a startling event, witnessing the sexual molestation of his own child at the hands of a trusted member of the family, the witness's step-son, who the witness had allowed to share the bedroom of his son. 5/6/02 TT at 63, 108 The Court of Appeals also found that Tony Hines was still under the stress of the startling event when he disclosed what had occurred. Appendix A The molestation occurred at 2:30 a.m. (5/6/02 TT at 108) and Tony Hines' statements to Officer Biggs took place at 8:00 a.m. (5/6/02 TT at 107), likely right around when the police station opened for business. Officer Biggs testified that Tony Hines was very emotional, crying and generally having a difficult time. 5/6/02 TT at 107 There is no indication that Mr. Hines' statement was the result of questioning because Tony Hines came down to the station specifically to relate this event. Appendix A There was no evidence presented in this case that Officer Biggs was either suggestive or persistent in questioning Hines about the event he witnessed, nor was there evidence to suggest that Hines' statements resulted from the stress of the officer's questioning. Appendix A

7-8. The People admit the allegations in paragraphs seven through eight.

9. The People deny the allegations in paragraph nine. If statements are properly admitted under the excited utterance hearsay rule, they are by their nature non-testimonial. If the statements are admitted under MRE 803(2) the court has found that the declarant lacked the capacity to fabricate. People v Smith, 456 Mich 543, 551 (1998) Statements admitted under the excited

utterance hearsay exception are unlike “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions” or police interrogations. Crawford v Washington, ___ US ___; 124 S Ct 1354; ___ LEd 2d ___ (2004) As stated in Crawford, “[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law. . .” Id.

10-11. The People admit the allegations in paragraphs ten through eleven to the extent that, though the prosecution admitted the statements of the deceased Tony Hines at trial, ***the statements of Tony Hines to the molestation were consistent with the defendant’s own statement to the police and his trial testimony.*** Therefore, any improper admission of the statements could only be harmless error. People v Minor, 213 Mich App 682, 685; 541 NW2d 576 (1995)

Defendant testified at trial that he was awakened by the naked Anthony Hines performing oral sex on him. He also testified that when Tony Hines opened the door, Anthony jumped off the bed. 5/6/02 TT at 230 This account was consistent with Tony Hines’ statement. Tony Hines also told the police that when he walked in the room, he saw his son performing oral sex on his step-son. 5/6/02 TT at 108 At trial, defendant’s defense centered on what happened ***before*** Tony Hines walked into the room. The defendant said that Anthony was the aggressor and sexually assaulted Nicholas Jackson while Jackson was sleeping (5/6/02 TT at 230) while Anthony said that it was the defendant who forced him to have oral sex. 5/6/02 TT at 63-67 Therefore, because defendant did not disagree with Tony’s observations, even if defendant could show that the statements had been erroneously admitted, any error would solely be harmless.

12. The People deny the allegations in paragraph twelve. The Confrontation Clause was

not violated because the statements were non-testimonial and were properly admitted under the excited utterance hearsay exception. Furthermore, any improper admission would solely amount to harmless error.

13. The People admit that the trial court and Court of Appeals found that the statements were properly admissible, however, neither of these courts found that the statements were testimonial in nature.

14-16. The People admit the allegations in paragraphs fourteen through sixteen.

17. The People admit that pursuant to Crawford v Washington, supra statements made as the result of police interrogations qualify as testimonial, but deny that the statement of the declarant was a product of a police interrogation. The Court of Appeals instead found that “[t]here was no evidence that [Tony Hines’] statements were made as a result of questioning by the officers.” Appendix A The People note that in Crawford, the declarant’s statement was a “recorded statement, knowingly given in response to structured police questioning.” Id.

18-19. The People admit that the Court in Crawford made the statements in paragraphs eighteen through nineteen.

20. The People admit that the Court in Crawford did not determine whether the statements admitted in White v Illinois, 502 US 346; 112 S Ct 736; 116 L Ed 2d 848 (1992) would be ultimately admissible under Crawford. However, in Michigan before a statement is properly held admissible under the excited utterance hearsay exception, the court must make a finding that the declarant lacked the capacity to fabricate. Smith, supra

21-24. The People deny the allegations in paragraphs twenty-one through twenty-four. The People submit the statements were non-testimonial, however, in this case of all cases, even if the

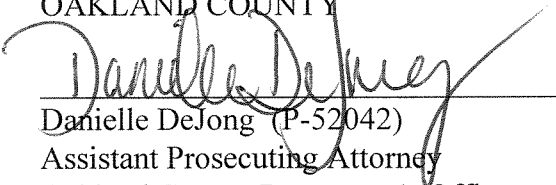
statement had been improperly admitted, only harmless error would have resulted. Therefore, the People also submit that a finding on how MRE 803(2) is impacted by Crawford, supra is not necessary for the decision. When the defendant in his own words admitted the sexual contact observed by the eye-witness, defendant's argument that the reason he remains in prison is due to a third party's statement is not particularly compelling.

WHEREFORE, David Gorcyca Prosecuting Attorney in and for the County of Oakland, by Danielle DeJong, respectfully requests that this Court deny defendant's application for leave to appeal.

Respectfully submitted,

DAVID GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

By:


Danielle DeJong (P-52042)
Assistant Prosecuting Attorney
Oakland County Prosecutor's Office
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-0656

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